A-B CHEW INVESTMENTS PTE. LTD.

v.

LIM TJOEN KONG

HIGH COURT, SINGAPORE
P COOMARASWAMY J
[SUIT NO. 10980 OF 1985]
31 JULY 1998

EVIDENCE: *Appeal against Senior Assistant Registrar's decision to allow application by the defendant to strike out certain paragraphs of plaintiff affidavit - Without prejudice negotiations - Non-party to negotiations cannot claim privilege - Once waived cannot later rely on - Section 23 Evidence Act.*

This is an appeal by the plaintiff against the decision of the Senior Assistant Registrar to allow the application by the defendant to strike out certain paragraphs of the plaintiffs affidavit on the ground that the said paragraphs relate to a "without prejudice" negotiation.

The plaintiff and the defendant entered into a contract whereby the defendant was to purchase the plaintiffs shares in a company. One of the terms of the contract was that the defendant would pending completion in September 1983 of the said purchase, service the interest charged on the plaintiffs and Chew Beng Gim's (Chew), a director of the plaintiffs, overdraft accounts with certain banks.

The contract was arranged through a broker, one Khoo Chin Inn (Khoo). The plaintiff contends that the defendant had failed to complete the purchase although he kept up on interest payments after the completion date had fallen due.

The plaintiff applied for summary judgment. The defendant's defence was that he was not a party to the agreement as he was out of the country at the material time. He also denied making any interest payments into the plaintiffs account.

The defendant filed an affidavit on 12 March 1986 by 'Khoo' alleging that the plaintiff's offer was taken up by one Gozali. However the option was cancelled after negotiations on behalf of Gozali and the plaintiffs.

On 14 March 1986, the defendants filed an affidavit reaffirming what 'Khoo' had said in his affidavit. In reply to the defendant's affidavits, the plaintiff to the negotiations attempted to explain what had transpired of the same through 'Chew's' affidavit on 3 May 1986.

On 15 May 1986, Khoo in his affidavit averred that the negotiations referred to in the plaintiff's affidavit of 3 May 1986 were made on a "without prejudice" basis. Chew then by affidavit of 17 May 1986, gave his version of the negotiations.

The issues before the Court was whether privilege attached to the negotiations can be claimed by the defendants. 'Khoo's' affidavit of 12 March 1986, clearly intimates that the defendant was not a party to negotiations and that negotiations were between the plaintiffs, Khoo and Gozali: However in Khoo's affidavit of 20 May 1986 he asserted that the defendant was also represented by him in the negotiations. The defendant has not clarified the position in the affidavit.

Held - allowing the plaintiffs appeal:

[1] The law on admissibility of statements made 'without prejudice' or in 'without prejudice' negotiations is in s. 23 of the Evidence Act 1950. The English Common law on 'without prejudice' statements in civil cases is part of the law. A party who has no part in the 'without prejudice' negotiations cannot claim privilege. There is a glaring inconsistency as to the defendant's participation which has not been satisfactorily explained. The defendant is not entitled to claim privilege.

[2] In any event, the privilege has been waived by the defendants. From the exchanges in the affidavits, the parties have delved at considerable lengths on the contents of the negotiations which would otherwise have been privileged. A party cannot unilaterally waive privilege only to claim it later when his adversary responds by making further references to 'without prejudice' negotiations.

Cases referred to:
La Roche v. Armstrong [1922] 1 KB 485
McTaggart v. McTaggart [1949] P 94
Sobell v. Boston [1975] 2 All ER 282
Walker v. Wilsher [1889] 23 QBD 335
Computer Machinery Co. Ltd. Dreschner [1983] 3 All ER 153
Cutts v. Head [1984] Ch 290

Legislation referred to:
Evidence Act 1950 (Cap 97) [Sing], s. 23

Other source referred to:
Halsbury's Laws (4th Edn.,) Vol. 17 p. 235

For the plaintiffs - H.E. Cashin; M/s. Goh Poh & Partners
For the defendant - Harry Wee (Lawrence Fong with him) M/s. Lee & Lim

JUDGMENT

P Coomaraswamy J:

This appeal arises from the striking out of para. 11 and paras. 4 and 5 of the affidavits of Chew Beng Gim (Chew), a director of the plaintiffs, filed on 3 May 1986 and 17 May 1986 respectively. The affidavits were filed by the plaintiffs in reply to affidavits filed by the defendant.

Before the Assistant Registrar, there were two applications. One was by the defendant to have the statement of claim struck out based on the ground that he was not a party to any contract with the plaintiffs. The other was the plaintiffs' application for summary judgment under O. 14. The Assistant Registrar ordered that the three paragraphs referred to above be struck out on the grounds that the contents therein arose in the course of "without prejudice" negotiations between the plaintiffs, the defendant and their representatives.

Facts:

The plaintiffs claim that by a contract made with the defendant, the defendant agreed to purchase the plaintiffs' shares in SPP Limited, a Singapore company. The contract was claimed to have been arranged through a broker, Khoo Chin Inn (Khoo). One of the terms of this contract was that the defendant would, pending completion in September 1983, service the interest charged on the plaintiffs' and Chew's overdraft accounts with certain banks. The plaintiffs contend that the defendant had failed to complete the purchase although he kept up the interest payments after the completion date had fallen due.

Defence

The defendant claims that he was not a party to the agreement with the plaintiffs as he was out of the country at the relevant time. He also denies making any interest payments to the plaintiffs' account. The defendant filed on 12 March 1986 an affidavit by Khoo to say that the plaintiffs' offer was in fact taken up by one Irwan Gozali, an Indonesian businessman.

Gozali confirmed this in his affidavit filed by the defendant on 14 March 1986 where he explained that the plaintiffs' option to purchase the shares was conveyed to him through Khoo, sometime in June 1983.

However, by October 1984, he had discovered that the shares had fallen heavily in value and that certain representations made to him by the plaintiffs were untrue. He thereupon sought to terminate the interest payments and to abandon the option. There followed a series of negotiations which forms the subject of the present application.

Negotiations

The fact of negotiations was first raised in Khoo's affidavit filed by the defendant on 12 March 1986. In it, Khoo stated that the option was cancelled after negotiations on behalf of Gozali and the plaintiffs. Gozali then filed an affidavit on 14 March 1986 reaffirming this at para. 10:

> After a series of discussions between the plaintiffs and my intermediaries it was agreed in early December 1984 I could abandon the option provided I paid interest in the sum of $50,000 payable in two instalments and I duly paid the same.

This was challenged by the plaintiff in Chew's affidavit filed on 3 May 1986. On the offending paragraphs, he said in para. 11 of his affidavit:

> I crave leave to refer to para. 10 of the affidavit of Irwan Gozali. The negotiations were carried out between the defendant himself and on his behalf by Khoo with Mr. Subhas Anandan and were on the methods of payment of the shortfall represented by the agreed price of $2,278,400 less the total proceeds of $696,079 from the sale of SPP Ltd. shares in the market. One of the proposals put forth by the defendant to Mr. Subhas Anandan to pay the shortfall of $1,582,232 plus the outstanding interest was by way of transfer of three units of housing at One Tree Hill Gardens being developed by T K Lim Realty Pte Ltd, the defendant's company.
>
> Annexed hereto and market 'F' is a copy of the telex from Khoo to Mr. Subhas Anandan, a copy of the telex marked 'G' from Mr. Subhas Anandan to the said Khoo and a copy of the letter from Khoo to Mr. Subhas Anandan marketed 'H' giving specifications and built-up area of the units offered by the defendant. The proposal was aborted as the development was encumbered and no satisfactory proposal to lift the encumbrances came from the defendant.

This sparked off a series of exchanges regarding what actually transpired at the negotiations and the identities of the parties involved.

I reply, on 15 May 1986, Khoo stated at para. 9 of his affidavit filed that day by the defendant:

> As regards para. 11 of the said affidavit, I deny that there was any representation made by me on behalf of the defendant to Mr. Subhas Anandan who was acting for me in the 'without prejudice' negotiations regarding the balance of the overdraft interest and not the alleged shortfall claimed against the defendant. Mr. Subhas Anandan had certain buyers who were interested in the property referred to therein and had requested more particulars thereof.

In reply to the matters set out above, Chew sets out his own version at paras. 4 and 5 of his affidavit filed by the plaintiffs on 17 May 1986:

> As to para. 9 of this affidavit annexed hereto and marked "CBG4" is a draft prepared by Mr. Subhas Anandan which incorporated one of the proposals made by the defendant for securing payment of the amount claimed by the plaintiffs through the issue of shares to the plaintiffs by Alethea Pte. Ltd. which shares were to be paid for by capitalisation of the defendant's loans to his own family company. The proposal set out in "CBG4" fell through and the defendant offered to transfer three units of housing in the One Tree Hill Gardens. For this purpose I had a valuation of the units made. Annexed hereto and marked "CBG5" is a copy letter to Mr. Subhas Anandan dated 25 January 1985 enclosing the valuation. The price of the units to be transferred to the plaintiffs was to be the payment of the amount of the plaintiffs' claim the plaintiffs eventually agree to take two units with the balance of its claim to be paid by the defendant in cash. I then instructed Messrs Goh Poh & Partners to help in drafting an agreement for this proposal. However, the searches showed that the property was encumbered to a limit of $5,000,000. Annexed hereto and marked "CBG6" is a copy of the company search on Alethea Pte. Ltd. showing the charges registered against the company and a copy of the certificate of title showing the encumbrances marked "CBG7". Goh Poh & Partners then wrote to Mr. Subhas Anandan on 30 July 1985 as per Annexure "CBG8".

The issue before me is whether the privilege attaching to these negotiations can be claimed by the defendant. It is not clear who the parties to the negotiations are. Khoo's affidavit filed on 12 March 1986 clearly intimates that the defendant was at no time a party to these negotiations and that the negotiations were between the plaintiffs, Khoo himself and Gozali. This is, of course consistent with the defendant's assertion that he had never made any representations to the plaintiff concerning the sale of the shares or entered into any such agreement.

However, in para. 3 of Khoo's affidavit filed by the defendant on 20 May 1986 in aid of the application to strike out the pleadings, Khoo asserts that the defendant was also represented by him in the negotiations. This is clearly inconsistent with the earlier version put forth by him. I should also be noted that the defendant himself has not come forth to clarify the position in an affidavit.

The law on the admissibility of statements made 'without prejudice' or in 'without prejudice' negotiations is in s. 23 of the Evidence Act (Cap 97, 1985 Edn.,) which reads:

> In civil cases no admission is relevant if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given.

In the Evidence Act 1950, an "admission" is not necessarily a statement adverse to the party making it. Section 17(1) defines it as:

> An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons and under the circumstances hereinafter mentioned.

Section 23 merely states a broad principle and does not specify detained rules. For this, we must look to English law. Sir Fitzjames Stephen, who drafted the Indian Evidence Act 1872, (the direct parent of our Act, originally enacted in 1893), also wrote a Digest of the English law of evidence and his Article 20 is, with immaterial differences, identical to s. 23 of our Act. In effect, therefore, the English common law on without prejudice statements in civil cases is part of our law.

The privilege only applies to statements by the parties and solicitors respectively acting for them: *La Roche v. Armstrong* [1922] 1 KB 485. If a party took no part in the without prejudice negotiations, either personally or through an agent, he cannot claim the privilege. There is a

glaring inconsistency in the affidavits filed by the defendant on the crucial point of the defendant's participation which has not been satisfactorily explained. I am satisfied that the defendant is not entitled to claim the privilege.

Although this ground alone is sufficient to dispose of the application, I am also of the view that the privilege has in any case been waived by the defendant. It is clearly established that the privilege can be waived with the consent of both parties: *McTaggart v. McTaggart* [1940] p. 94. The privilege may be waived by the person entitled to claim it, either expressly or by allowing evidence to given of matters in respect of which privilege might have been claimed: para. 235 *Halsbury's Law* (4th Edn.,) Vol. 17.

It is abundantly apparent from the exchanges in the affidavit filed that both parties have delved at considerable length on the contents of the negotiations and have referred to matters which would otherwise be privileged.

The defendant contents that the privilege is not waived by simply filing an affidavit which makes reference to privileged matters. He cites *Sobell v. Boston* [1975] 2 ALL ER 282 in support. In this case, the plaintiff filed an affidavit where he referred to a privileged discussion with the defendant. In reply, the defendant filed an affidavit to correct the plaintiff's version. The defendant also stated that the conversation was without prejudice. The plaintiff subsequently contended that the privilege was waived on the ground that the defendant had let in the evidence by giving his own version in his affidavit.

In making the finding that this did not amount to a waiver, Goff J (as he then was) observed at p. 287:

> Where the evidence is given by affidavit the opposing party is faced with a dilemma. If he says, merely, I am advised that this is inadmissible and I need not answer it," then if the objection is overruled he must seek an adjournment which may not be allowed or which may be allowed only on adverse terms as to costs and if he does not, or if his application be not granted, he will be left with no evidence on his side. I cannot think that the privilege can be waived by an affidavit which says, "I object that my opponent's affidavit is inadmissible because the matter it contains is privileged, but in any case should the evidence be received, I say that it is wrong, and this is my version. Of course, when the affidavits are being read Counsel should at once object, and if he allows the offending affidavit to be read without objection, he may well waive the privilege despite the form of his own affidavit, but here Counsel for the defendants made it clear from the outset that he did object, and I only received the affidavits on this point *de bene esse* pending argument.

To my mind, these observations must be confined to the facts of the case itself. I do not think that Goff J was purporting to define the threshold of waiver. Each case must be considered on its own facts and the conduct of the parties.

There is yet another and a key way of looking at the facts in the case before me and the contentions of the parties which to my mind finally concludes the matter in the plaintiffs' favour. Public policy to my mind cannot allow a party to blow hot and cold. A party cannot unilaterally waive privilege only to claim it later when his adversary responds by making further reference to the without prejudice negotiations. To put it in terms of the law of contract, when one of two parties to an agreement repudiates it, the other party has one of two options:

(a) he can either accept the repudiation and treat the whole matter as never part of any agreement; or,

(b) he can abide by the agreement and hold the party repudiating it to the agreement and the consequences of repudiating it.

The plaintiffs have chosen the first option. The defendant cannot be allowed wilfully to breach the law on without prejudice negotiations and then, when he finds the consequences to his disadvantage, make claim to the privilege. This is what defendant's Counsel attempted to do in argument before me when he said that the plaintiffs could strike out the objectionable paragraphs in affidavits filed by the defendant. He went further admitting the weakness in law of his case by saying, "I will consent to them being struck out". This is precisely what I meant when earlier I said that on this issue, a party cannot blow hot and cold.

In our case, it is the defendant who opened the door of privilege by allowing reference to be made to the privileged discussions in Khoo's affidavit filed on 12 March 1986 and Gozali's affidavit filed on 14 March 1986. The plaintiffs in Chew's affidavit filed on 3 May 1986 had merely sought to challenge the version given in the affidavits filed by the defendant. The defendant could have taken out an application to strike out then but did not do so. Instead, he replied with a further affidavit of Khoo's filed on 15 May 1986 which descended into the details of what had actually transpired. Rather than close the door of privilege, the defendant and his solicitors opened it even wider. By their conduct, they had waived the privilege.

In my view, public policy cannot allow a party who refers to without prejudice negotiations in an affidavit (or who files such an affidavit by some other deponent) thinking such reference is in his favour, later, upon his adversary filing an affidavit with reference to the initiator's disadvantage, to claim privilege. If he were permitted to do so, much time would be wasted and unnecessary steps in pre-trial procedure have to be taken.

I should, though the case is not directly material to the facts before me, refer to *Walker v. Wilsher* [1889] 23 QBD 335 which decided that without prejudice communications should not be looked at by a Court without the consent of both parties. It was a case of a without prejudice offer which the defendant successfully used at first instance to deprive the plaintiff of costs as the plaintiff recovered less than the offer. *Walker v. Wilsher* (*supra*) has in the very recent past been 'explained' and 'qualified' by Sir Robert Megarry VC in *Computer Machinery Co Ltd v. Dreschner* [1983] 3 ALL ER 153 at 156 and by the Court of Appeal in *Cutts v. Head* [1984] Ch 290 as to be of little authority today.

For the reasons given above, I am of the view that this appeal must be allowed with costs here and below.

Also found at [1989] 2 CLJ 1109